

Bank of Am., N.A. v Campbell
2013 NY Slip Op 30962(U)
April 18, 2013
Supreme Court, Suffolk County
Docket Number: 10-37589
Judge: John J.J. Jones Jr
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INDEX No. 10-37589
CAL. No.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 9/10/12
ADJ. DATE
Mot. Seq. # 001 - MG

-----X

Bank of America, N.A.,

Plaintiff,

- against -

Michael Campbell, Anna Marie Campbell,
Autilia Simonetti a/k/a Autillia Simonetti, Bank
of America, N.A., United States of America, New
York State Commissioner of Taxation and
Finance, Clerk of the Suffolk County District
Court, Brookhaven Memorial Hospital Medical
Center, People of the State of New York, and
"JOHN DOE #1" through "JOHN DOE #10", the
last ten names being fictitious and unknown to
the plaintiff, the person or parties intended being
the person or parties, if any, having or claiming
an interest in or lien upon the Mortgaged
premises described in the complaint,

Defendants.

-----X

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Attn: Beth P. Schwartz

Upon the following papers numbered 1 to 25 read on this motion for summary judgment and order of reference;
Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Affirmation in Opposition 16 - 18; Reply Affirmation
and supporting papers 18 - 25; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the
motion is decided as follows: it is

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ORDERED that this motion by plaintiff Bank of America, N.A. (BANA) pursuant to CPLR 3212 for summary judgment on its verified complaint against defendant Michael Campbell, to strike the answer of the defendant Campbell, granting a default judgment against those non-appearing defendants, for leave to amend the caption of this action pursuant to CPLR 3025 (b) by substituting the name Charles Campbell for “John Doe #1” and by striking the names of defendants Autilia Simonetti a/k/a Autillia Simonetti and “John Doe #2 through John Doe #10”, and for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is hereby determined as follows; and it is hereby

ORDERED that the branch of the motion by plaintiff BANA pursuant to CPLR 3212 for summary judgment on its verified complaint against defendant Michael Campbell, to strike his answer and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that plaintiff’s application for a default judgment as to the remaining non-appearing defendants is granted; and it is further

ORDERED that plaintiff’s application for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by substituting the name Charles Campbell for “John Doe #1” and by striking the names of defendants Autilia Simonetti a/k/a Autillia Simonetti and “John Doe #2 through John Doe #10”; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK**

_____ x
 Bank of America, N.A.,

Plaintiff,

- against -

Michael Campbell, Anna Marie Campbell, Bank of America,
 N.A., United States of America, New York State Commissioner
 of Taxation and Finance, Clerk of the Suffolk County District
 Court, Brookhaven Memorial Hospital Medical Center, People
 of the State of New York, Charles Campbell,

Defendants.

_____ x

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This is an action to foreclose a mortgage on premises known as 273 Tyler Avenue, Miller Place, New York. On February 23, 2006, defendants Michael Campbell and Anna Marie Campbell (Campbell) executed a note in favor of Bank of America, N.A. (BANA) agreeing to pay \$312,629.00 at the rate of 6.500 percent per year. On February 23, 2006, defendants Campbell also executed a mortgage in the principal sum of \$312,629.00 on their home, the subject property. The mortgage was recorded on March 21, 2006 in the Suffolk County Clerk's Office.

BANA sent a notice of default dated January 22, 2010 to defendants Campbell stating that they had defaulted on their mortgage loan and that the amount past due was \$5,482.12. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on October 8, 2010. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms of the note and mortgage by failing to make their monthly payments commencing with the December 1, 2009 payment. Defendant Michael Campbell interposed an answer by entering a denial with six affirmative defenses.

The Court's computerized records indicate that a foreclosure settlement conference was held on May 1, 2012 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendants Campbell failed to comply with the terms of the note and mortgage; that defendants Campbell were provided with a notice of default dated January 22, 2010; that defendants Campbell did not cure the default; and, that defendant Michael Campbell's answer and affirmative defenses fail to demonstrate the existence of a triable issue of fact. In support of its motion, plaintiff submits among other things: the affirmation of Nancy G. Burlingame, Esq., an attorney at Frenkel, Lambert, Weiss, Weisman & Gordon, LLP attorneys for plaintiff; the affidavit in support of summary judgment of Jay Robert Karnes, assistant vice president at Bank of America, NA, successor by merger to BAC; the summons and complaint; the defendant's answer; the note and mortgage; a notice of default; notices pursuant to RPAPL §§ 1320, 1303 and 1304; affidavits of service for the summons and complaint; an affidavit of service for the instant summary judgment; and a proposed order appointing a referee to compute.

Defendant Michael Campbell by his attorney, has submitted an affirmation in opposition to the instant summary judgment motion asserting, *inter alia*, that plaintiff does not have standing to commence this action.

Plaintiff in reply opposes defendant's assertion that it does not have standing.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*see Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; *Village Bank v Wild Oaks Holding*, 196 AD2d 812, 601 NYS2d 940 [2d Dept 1993]). Once a plaintiff has made this showing, the burden then shifts to defendant to produce evidentiary proof in admissible form sufficient to require a trial of their defenses (*see Ames Funding Corp. v Houston*, 44 AD3d 692, 843 NYS2d 660 [2d Dept

2007]; *Household Fin. Realty Corp. of New York v Winn*, 19 AD3d 545, 796 NYS2d 533 [2d Dept 2005]).

Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action “[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced” (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2d Dept 2009]). “Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” (*HSBC Bank USA v Hernandez*, 92 AD3d 843).

Here, plaintiff produced the note and mortgage, as well as evidence of defendants’ nonpayment. Jay Robert Karnes, assistant vice president at BANA avers that defendants borrowed funds from BANA; that plaintiff is the holder of the note; that defendants defaulted on the loan by failing to make their monthly payment due on December 1, 2009 and continuing to the present; that on January 22, 2010, plaintiff sent a default letter to defendants; and that defendants did not cure the default. The credible evidence before the court establishes that plaintiff BANA was the original lender in connection with the subject note and mortgage and that same has remained in their possession.

Once plaintiff has made a prima facie showing, it is incumbent on defendant “to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff” (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704, 834 NYS2d 198, 199 [2d Dept 2007] quoting *Mahopac Natl. Bank v Baisley*, 244 AD2d 466, 467, 664 NYS2d 345 [2d Dept 1997]). Here, defendant has failed to demonstrate, through the production of competent and admissible evidence, a viable defense which could raise a triable issue of fact (*US Bank, Natl. Assoc. v Sharif*, 89 AD3d 723, 933 NYS2d 293 [2d Dept 2011]). “Motions for summary judgment may not be defeated merely by surmise, conjecture or suspicion” (*see Shaw v Time-Life Records*, 38 NY2d 201, 379 NYS2d 390 [1975]). Most significantly, defendant has failed to submit an affidavit in support of his answer and affirmative defenses or in opposition to the instant motion for summary judgment. Based upon the foregoing, defendant’s assertions do not establish a defense as a matter of law and are thereby rejected by the court.

Accordingly, the motion for summary judgment is granted against defendant Michael Campbell and the defendant’s answer and defenses are stricken.

In addition, plaintiff’s request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

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The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith as modified by the court.

To the extent that either plaintiff or defendant have requested other forms of relief but have not supported such noticed forms of relief with any allegations of law or fact, the court denies such applications.

Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court.

Dated: 18 April 2013



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION

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